IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 31-8-2007

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

C.M.A.No.2083 of 2000

1. Manickavasagam

2. Yasodharan

3. Moorthy @ Dhakshinamoorthy.. Appellants (Defendants 2 to 4)

Vs.

1. T.P.Ponnusamy

2. T.P.Paramasivam

3. Chennimalai Gounder

4. N.S.Ramasamy

5. Pappathy ... Respondents (Plaintiff & Defendants 1,5,6 & 7)

This Civil Miscellaneous Appeal is preferred against the Judgment and Decree dated 11.7.2000 made in A.S.No.36 of 2000 on the file of the Principal District Judge, Erode, modifying the Judgment and Decree dated 27.12.1999 made in O.S.No.191 of 1998 on the file of the District Munsif Court-cum-Judicial Magistrate, Perundurai.

For Appellants : Mr.N.Manokaran

For 1st Respondent : Mr.G.Ethirajulu

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J U D G M E N T

This Civil Miscellaneous Appeal is preferred against the Judgment and Decree dated 11.7.2000 made in A.S.No.36 of 2000 on

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the file of the Principal District Judge, Erode, modifying the Judgment and Decree dated 27.12.1999 made in O.S.No.191 of 1998 on the file of the District Munsif Court-cum-Judicial Magistrate, Perundurai.

2. The Plaintiff/first respondent herein filed the suit in O.S.No.191 of 1998 seeking declaration and permanent injunction contending that he is the absolute owner of the suit 'A' Schedule property by virtue of settlement deed dated 28.6.1994, and the right to take water through 'B' Schedule property for irrigation. The appellants/defendants 2 to 4 denied the genuineness of the title deed contending that they are the absolute owners of the property in R.S.No.1013/4 and they are having share in 'B' Schedule property and for the past over 50 years their ancestors have been using the suit 'B' schedule property to irrigate their lands.

3. The Trial court, after considering the oral and documentary evidence rendered a finding against the plaintiff/first respondent herein and dismissed the suit on 27.12.1999, against which the Plaintiff/first respondent herein filed A.S.No.36 of 2000 before the Principal District Judge, Erode. The appellate Court remanded the suit back to the Trial Court for giving a finding with regard to Ex.A-3 and A-4.

4. The said remand order passed by the appellate Court is challenged by the appellants/defendants 2 to 4 in this appeal by contending that the appellate Court itself ought to have considered the materials on record and should have decided the appeal on merits by either reversing or modifying or confirming the decree. It is also contended that the appellate Court having not given a finding with regard to the decision of the Trial Court, without assigning any valid reason to remand, passed an order of remand and by remanding the matter, the plaintiff/first respondent herein is given undue advantage to fill up the lacunae in the evidence on record and the same is in effect violation of Order 51 Rule 27 CPC.

5. The learned counsel appearing for the appellants/defendants 2 to 4 submitted that the only reason given by the lower appellate Court for remanding the matter is to give a finding with regard to Ex.A-3 and A-4 and the Trial Court having considered the said documents and given its findings, the said findings is valid or not can very well be decided by the lower appellate Court itself, for which no remand is required, particularly when no fresh evidence is required to be let in. The learned counsel also cited the decisions of this Court reported in 1996 (II) CTC 539 (Poolar v. Gomathi Moopanar and 2 others), 2005

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(3) LW 366 (S.Shanmugham v. Su.Sundaram & 4 others)(DB) and the judgment of the Supreme Court reported in (2006) 4 MLJ 1842 (Hameed (D) by LRs. and others v. Kummottummal Kunhi P.P.Amma (D) by LRs. and others) and argued that the lower appellate Court having not exercised its jurisdiction by deciding the matter on its own, the order of remand is unsustainable.

6. The learned counsel appearing for the first respondent/plaintiff submits that the reason given by the appellate Court to remand the matter to consider the averments in Exs.A-3 and A-4 and its finding is within the powers of the lower appellate Court and no interference is called for in the said order of remand.

7. I have considered the rival submissions made by the learned counsel appearing for the appellants as well as the learned counsel appearing for the first respondent.

8. The point in issue is whether the lower appellate Court itself could have considered the averments in Exs.A-3 and A-4 without remanding the matter to the Trial Court and whether without giving a finding as to the validity of the Trial Court order, remand order could be made under Order 41 Rule 23 to 29 CPC.

9. A fair reading of the order of the lower appellate Court shows that the only reason for ordering remand is that the Trial Court did not consider the averments in Exs.A-3 and A-4. No evidence is ordered to be recorded and hence appreciation of the averments in Exs.A-3 and A-4 could very well be made by the lower appellate Court itself as it has got every power to go into the factual aspects and is empowered to take a different view. Therefore, the reason given by the lower appellate Court for remanding the matter cannot be a valid reason. Further, whether the conclusion arrived at by the trial Court on the assessment of the evidence on record and exhibits marked are correct or not has not been stated by the lower appellate Court while ordering remand and the same is also contrary to the power of remand given to the lower appellate Courts under Order 41 Rule 23 A.

10. A Division Bench of this Court in the decision reported in 2005 (3) LW 366 (S.Shanmugham v. S.Sundaram & 4 others) held that under Order 41 Rule 23 to 29 CPC, for finding out a fact, there is no necessity to remand the matter back to the trial court and the lower appellate Court itself can try the matter even after taking further evidence for determining the issue and dispose of the appeal on merits.

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11. As per Order 41 Rule 23 to 29, a duty is cast upon the lower appellate Court to find as to whether the decree of the Trial Court should be set aside and even if there are some defects and infirmities in the reasoning given by the Trial Court, it is not a ground to remand the same. The lower appellate Court must give a reason by stating that the finding of the trial court cannot be supported and must be set aside and in exceptional cases only the appellate court can remand the suit for fresh trial.

12. A Division Bench of this Court in the decision reported in 1989 (2) LW 414 (Visalakshmi Ammal v. Dhanalakshmi Ammal) held thus,

> "The unsatisfactory consideration of an issue by the first court, and non-advertence to the judicial precedents by the first court while deciding an issue and the need to take additional evidence, should not always be counted in favour of making an order of remand. These lacunae, if in fact they are present, can be rectified by the appellate Court itself, unless there are very compelling circumstances to make an order of remand. An order of remand should not be taken to be matter of course on the above grounds. The power of remand should be sparingly exercised. There should be always endeavour to dispose of the case by the appellate Court itself, when the commissions and omissions made by the first court could be corrected by the appellate Court."

13. In the decision reported in (2006) 4 MLJ 1842 (SC) (Hameed (D) by LRs. and others v. Kummottummal Kunhi P.P.Amma (D) by LRs. and others), the Supreme Court considered the power of remand by the appellate Courts and in paragraph 6 held as follows:

> "... while remitting the matter, the High Court has not indicated as to what question of facts and law are required to be assessed and the circumstances upon which the High Court found itself unable to decide the matter."

14. In this case, the trial Court recorded a finding with regard to Exs.A-3 and A-4 and the said finding is correct or not can very well be decided by the lower appellate Court itself.

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15. Taking note of the said factual aspect and the above cited decisions, I am of the view that the remand order passed by the lower appellate Court is in violation of Order 41 Rule 23 to 29 CPC. Consequently the Civil Miscellaneous Appeal is allowed. The lower appellate Court is directed to dispose of the appeal on merits within a period of three months from the date of receipt of copy of this judgment. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

vr

To

1. The Principal District Judge, Erode.
2. The District Munsif-cum-Judicial Magistrate, Perundurai.
3. The Section Officer,VR Section, High Court, Madras.

+1cc to Mr.N.Manokaran,Advocate SR 54613

LA (CO)
km/11.9.

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